

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:

Case No.: 04-43755

Denise D. Day,

Chapter 13 Case

Debtor(s).

**NOTICE OF HEARING AND MOTION OBJECTING TO CONFIRMATION
OF CHAPTER 13 PLAN AND FOR DISMISSAL OR CONVERSION OF CASE**

TO: All parties in interest pursuant to Local Rule 9013-3.

1. Jasmine Z. Keller, Chapter 13 Trustee (the "Trustee"), moves the court for the relief requested below and gives notice of hearing.

2. The court will hold a hearing on this motion at 10:30 a.m. on September 2, 2004, in Courtroom No. 7 West, 7th Floor, United States Courthouse, 300 South 4th Street, Minneapolis, Minnesota.

3. Any response to this motion must be filed and delivered not later than 10:30 a.m. on September 1, 2004, which is 24 hours (1 business day) before the time set for the hearing, or filed and served by mail not later than August 30, 2004, which is three business days before the time set for the hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this chapter 13 case was filed on July 7, 2004. The case is now pending in this court.

5. This motion arises under 11 U.S.C. §§ 1307, 1322 and 1325 and Bankruptcy Rule 3015. This motion is filed under Bankruptcy Rule 9014 and Local Rules 3015-3, 9006-1, 9013-1 through 9013-5, and such other Local Rules as may pertain. Movant requests relief with respect to denial of confirmation of the debtor's proposed Amended Chapter 13 plan, dated August 17, 2004 (the "Plan") and dismissal or conversion of this case, whichever is in the best interests of the debtor's creditors and the estate.

6. The Plan calls for the debtors to make payments to the Trustee of \$1,180 per month for 36 months, for a total of \$42,480 (the "Plan Funds").

7. The Plan calls for the Plan Funds, net of the Trustee's estimated fee, to be

disbursed as follows:

| | |
|--|---------------------------------------|
| Attorney fees | \$ 1,250 |
| IRS priority tax claim | \$ 1,027 |
| Specialty Mortgage Corporation (est.; claim to govern) | \$18,945.84 (w. 8% int.) ¹ |
| First Federal (est.; claim to govern) | \$10,677.12 (w. 8% int.) |
| GE Mortgage Services, Inc. (est.; claim to govern) | \$ 6,332.04 (w. 8% int.) |
| TOTAL | \$38,232 |

8. Non-priority unsecured creditors, whose claims total approximately \$88,460, are projected to receive no distribution under the Plan.

9. The actual arrearage claim filed by Select is in the amount of \$38,304.45.

10. First Federal has not yet filed a proof of claim. However, the Objection to Confirmation of Modified Chapter 13 Plan filed by First Federal (“FF Objection”) alleges, in ¶ 6, that “the payments on the loan to First Federal are delinquent and unpaid in the total amount of \$975.00,” of which \$650 appears to be for pre-petition arrears, for the months of June and July 2004.

11. Neither the IRS nor GE Mortgage Services, Inc. (“GE”) has filed a proof of claim to date.

12. Although there is a significant discrepancy between the estimated arrearages on the First Federal mortgage, as compared to the amount set forth in the FF Objection, the Plan is still underfunded, due to the significantly higher than estimated arrearages on the Select mortgage.

13. The Plan does not provide for the submission of sufficient future income of the debtor as is necessary for the execution of the plan, contrary to 11 U.S.C. § 1322(a)(1).

14. The Plan makes no provision for payment of the secured claim of Car Hop, although this creditor is identified in Schedule D and a proof of claim has been filed by the assignee of Car Hop.

15. The Plan, in ¶ 6, proposes to cure the defaults on the mortgages to First Federal and GE and to “maintain the payments which come due after the date the petition was filed,” yet the debtor’s Schedule J does not include any amounts for the monthly payments due on these mortgages. The Plan is therefore not feasible, within the meaning of 11 U.S.C. § 1325(a)(6).

16. Because the debtor has failed to disclose her monthly payments to First Federal and GE, the Trustee cannot determine whether the rental property, which these two mortgages encumber, results in a positive cash flow for the debtor. The Trustee therefore objects to

¹ The proof of claim filed by the creditor is in the name of “Select Portfolio Servicing, Inc. f/k/a Fairbanks Capital Corporation,” which is apparently the assignee, servicer or successor in interest to Specialty Mortgage Corporation. This creditor will be referred to as “Select” in the remainder of this objection.

confirmation on the grounds that the Plan does not provide that all of the debtor's projected disposable income for the next 36 months will be devoted to making her Plan payments, as required by 11 U.S.C. § 1325(b)(1)(B).

17. The Trustee joins in and supports the FF Objection to the extent that said objection establishes that there is substantial non-exempt equity in the debtor's rental property, and therefore the Plan is not in the best interests of the debtor's unsecured creditors, as required by 11 U.S.C. § 1325(a)(4).

18. The Trustee also joins in and supports the FF Objection to the extent that the objection alleges that the Plan has not been filed in good faith, as required by 11 U.S.C. § 1325(a)(3).

19. Because there may be substantial non-exempt equity in the debtor's non-homestead rental property, conversion of the case to a case under Chapter 7, rather than dismissal, may be in the best interests of the debtor's creditors. The Trustee has drafted her proposed order in this case to provide for dismissal, but the court has the authority to order conversion instead, under 11 U.S.C. § 1307(c).

20. If testimony is required, the debtor and/or representatives of the other objectors may be called to testify at the hearing on the objection.

WHEREFORE, the Trustee moves the court for an order denying confirmation of the Debtor's proposed Amended Chapter 13, dismissing or converting the case, and such other relief as may be just and equitable.

Jasmine Z. Keller, Chapter 13 Trustee

Dated: August 27, 2004

By: /e/ Thomas E. Johnson
Thomas E. Johnson, ID # 52000
Margaret H. Culp, ID # 180609
Counsel for Chapter 13 Trustee
310 Plymouth Building
12 South 6th Street
Minneapolis, MN 55402
(612) 338-7591

VERIFICATION

I, Thomas E. Johnson, employed by the Chapter 13 Trustee, the movant named in the foregoing notice of hearing and motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: August 27, 2004

Signed: /e/ Thomas E. Johnson

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:

Case No.: 04-43755

Denise D. Day,

Chapter 13 Case

Debtor(s).

**MEMORANDUM IN SUPPORT OF OBJECTION TO CONFIRMATION
AND MOTION TO DISMISS OR CONVERT CASE**

FACTS

The Trustee relies upon the facts set forth in her verified motion which, for the sake of brevity, will not be repeated here.

LEGAL DISCUSSION

One of the fundamental requirements for confirmation of a Chapter 13 plan is found in 11 U.S.C. § 1322(a)(1), which states that a plan shall “provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan.” *11 U.S.C. § 1322(a)(1)*. Essentially, this statute requires the debtor to propose a plan that is fully funded, in the sense that the debtor commits to making sufficient payments to pay all the amounts required to be paid to creditors under the proposed plan.

Here, the debtor has only committed to paying a total of \$42,280 to the Trustee, yet the total priority and secured arrearage claims filed to date or provided for in the Plan exceed that number. The plan is under-funded and therefore unconfirmable.

Moreover, according to the debtor’s Schedule J, the debtor has only \$1,180/mo. available to make her Plan payment, yet in arriving at this sum Schedule J fails to include any amounts for payment on the first and second mortgages on the non-homestead property, despite the fact that her Plan obliges her to make these ongoing payments. The FF Objection alleges that the monthly payment on that mortgage is \$325/mo., with a full balloon payment due two years hence. The amount of the GE mortgage payment is unknown, because that creditor has not yet filed a proof of claim, but in any event it is clear from the debtor’s own budget that there is not enough money available to pay these two mortgages *and* the mortgage on her homestead² *and*

² The attachment to the Select proof of claim recites delinquent monthly payments of \$2,935.45/mo. Schedule J lists a “rent or home mortgage payment” of \$2,926, which is apparently the monthly payment to Select. In other

her Plan payment. The Plan is therefore not feasible, in that the debtors will not “be able to make all payments under the plan and [] comply with the plan.” 11 U.S.C. § 1325(a)(6).

A related problem arising from the lack of disclosure of the mortgage payments for the non-homestead property is that the Trustee cannot determine whether the rental income from the property is sufficient to pay the mortgages and related expenses for this property, such that there is a positive cash flow. If the property has a negative cash flow, then the debtor is proposing to use her available disposable income to build up equity in non-homestead real estate, rather than using this money to pay her unsecured creditors. *See, In re Lindsey*, 122 B.R. 157, 158 (Bankr. M.D. Fla. 1991) (“[T]he court may not and should not permit the debtors to use a Chapter 13 plan to retain and increase their equity in investment property at the expense of their unsecured creditors.”). The Trustee therefore objects on the grounds that the debtor is not proposing to pay all of her available disposable income for the next 36 months toward her Plan payments. 11 U.S.C. § 1325(b)(1)(B).

Additionally, the Trustee objects that the Plan fails the “best interests of creditors” test of 11 U.S.C. § 1325(a)(4). The FF Objection raises significant doubt as to the accuracy of the debtor’s valuation of the non-homestead real estate. In fact, there appears to be significant non-exempt equity in this real estate, yet the Plan proposes a zero percent return to non-priority unsecured creditors. The creditors would be better off in a Chapter 7 liquidation than they would be under the proposed Plan.

The combination of lack of disclosure, under-valuing of assets, and attempts to retain investment property at the expense of her unsecured creditors leads to the conclusion that the debtor’s plan has not been filed in good faith. “The bad faith determination focuses on the totality of the circumstances, specifically: (1) whether the debtor has stated his debts and expenses accurately; (2) whether he has made any fraudulent representation to mislead the bankruptcy court; or (3) whether he has unfairly manipulated the bankruptcy code. [*In re LeMaire*, 898 F.2d 1346, 1349 \(8th Cir.1990\)](#).” *In re Molitor*, 76 F.3d 218, 221 (8th Cir. 1996). Confirmation should also be denied on the grounds that the case and the Plan have not been filed in good faith. 11 U.S.C. § 1325(a)(3).

Dismissal or conversion to Chapter 7 is appropriate for cause under 11 U.S.C. § 1307(c)(1). Because there appears to be significant non-exempt equity in the non-homestead real property, the court should consider whether conversion of the case to Chapter 7 is the more appropriate remedy under the circumstances.

CONCLUSION

The debtor’s Plan is not confirmable for numerous reasons. Confirmation should be denied and the case dismissed or converted to Chapter 7.

words, the “rent or home mortgage payment” amount in Schedule J includes the payment to Select only, and no other mortgage.

Respectfully submitted:

Dated: August 27, 2004

Signed: /e/ Thomas E. Johnson

Thomas E. Johnson, ID # 52000

Margaret H. Culp, ID # 180609

Counsel for Chapter 13 Trustee

310 Plymouth Building

12 South 6th Street

Minneapolis, MN 55402

(612) 338-7591

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:

Case No.: 04-43755

Denise D. Day,

Chapter 13 Case

Debtor(s).

UNSWORN DECLARATION FOR PROOF OF SERVICE

I, Thomas E. Johnson, employed by Jasmine Z. Keller, Chapter 13 Trustee, declare that on August 27, 2004, I served Notice of Hearing and Motion Objecting to Confirmation of Chapter 13 Plan and for Dismissal or Conversion of Case, Memorandum of Facts and Law and proposed Order on the individual(s) listed below, in the manner described:

By e-mail:

United States Trustee
1015 United States Courthouse
300 South 4th Street
Minneapolis, MN 55415

By first class U.S. mail, postage prepaid:

Denise D. Day
301 Bluff Road
Carver, MN 55315

Paul E. Ross, Esq.
Attorney at Law
287 Marschall Road, Suite 203-A
Shakopee, MN 55379

Wells Fargo Bank, N.A.
c/o McCalla, Raymer, et al.
Bankruptcy Department
1544 Old Alabama Road
Roswell, GA 30076

James A. Geske, Esq.
Wilford & Geske
7650 Currell Blvd., Suite 300
Woodbury, MN 55125

Patrick J. McGuigan, Esq.
Attorney at Law
176 Snelling Ave. N., Suite 200
St. Paul, MN 55104

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: August 27, 2004

/e/ Thomas E. Johnson

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:

Case No.: 04-43755

Denise D. Day,

Debtor(s).

Chapter 13 Case

ORDER DENYING CONFIRMATION AND DISMISSING CASE

At Minneapolis, Minnesota, _____.

The above-entitled matter came on for hearing before the undersigned United States Bankruptcy Judge on the Chapter 13 Trustee's objection to confirmation of the debtor's proposed Chapter 13 plan, and motion to dismiss.

Appearances were noted in the minutes.

Upon the verified motion and all of the files, records and proceedings herein:

IT IS ORDERED:

1. Confirmation of the debtor's Chapter 13 plan is DENIED.
2. This case is DISMISSED.

United States Bankruptcy Judge